

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 01-3024-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CF 1126

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID E. POLNITZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: KITTY K. BRENNAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. David E. Polnitz appeals from a judgment of conviction entered after he pled guilty to one count of robbery, with the use of force, as party to a crime. See WIS. STAT. §§ 943.32(1)(a) and 939.05 (1999-

2000).¹ Polnitz claims that the trial court erred when it denied his motion to suppress his confession because he claims that: (1) his confession was involuntary; (2) he was detained for an unreasonable length of time; and (3) his confession was so closely related to a polygraph examination that it was inadmissible under the Wisconsin rule that statements made during polygraph examinations are inadmissible. We affirm.

I. BACKGROUND

¶2 David E. Polnitz was charged with one count of robbery, with the use of force, after he and Ronald Deloache robbed Gwendolyn Shelmire and attempted to rob her mother, Augustine Wilson, at gunpoint. According to the complaint, on March 2, 2000, Shelmire and Wilson were walking in an alley after Shelmire had cashed her Social Security check when Polnitz and Deloache drove up and got out of a maroon, two-door Pontiac. Both men were wearing ski masks and were armed with handguns. A man who was later identified as Deloache walked up behind Shelmire, grabbed her, and searched her pockets for money. After removing some money from Shelmire's coat pocket, Deloache put his gun to Shelmire's head and demanded: "Give me more money." Shelmire struggled and broke free from Deloache. He knocked her to the ground and hit her in the back of the head with a gun before going back to the car.

¶3 While this was happening, another man, later determined to be Polnitz, confronted Wilson with a gun and said: "Give me the money." Wilson

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted. Polnitz was also charged with one count of attempted armed robbery, with the use of force, as party to a crime. *See* WIS. STAT. §§ 943.32(1)(a) and (2), 939.32, and 939.05. This charge was dismissed and read-in at sentencing.

told Polnitz that she did not have any money, but Polnitz pointed the gun at Wilson and patted-down her pockets. Wilson then tried to run away. When she looked back, she saw two men running back to the car and Shelmire lying on the ground.

¶4 Polnitz was arrested “around” 9:00 a.m. on March 3, 2000.² Detectives interviewed Polnitz three times. The first two interviews took place on March 3, 2000. Polnitz denied that he was involved in the robbery during these interviews. On the morning of March 4, 2000, Polnitz took a polygraph examination. A detective then interviewed Polnitz for a third time. During the third interview, Polnitz admitted that he was present during the robbery.

¶5 Polnitz filed a motion to suppress all of the statements he made to the police. Polnitz claimed that his statements were involuntary because: he could not read, he was held for one and one-half days without much sleep, he received “minimal” food, he had no contact with his family, and a police officer told him that he could go home if he admitted to being involved. Polnitz also claimed that the confession was inadmissible because the third interview was not sufficiently attenuated from the polygraph examination.

¶6 The trial court held a *Miranda/Goodchild* hearing.³ Three detectives testified at the hearing. Detective Thomas E. Fischer conducted the first interview with Polnitz. Fischer testified that the first interview started on March 3, 2000, at 11:39 a.m. and ended at 1:27 p.m. At the beginning of the interview,

² Polnitz testified that he was arrested “around nine.” A detective testified that Polnitz was arrested at 10:05 a.m. The trial court used 9:00 a.m. as the time of Polnitz’s arrest.

³ *Miranda v. Arizona*, 384 U.S. 436 (1966); *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Fischer informed Polnitz of his *Miranda* rights and Polnitz indicated that he understood and waived his rights. Fischer testified that during the interview, he did not make any threats or promises to Polnitz. Fischer further testified that Polnitz did not ask for any food and that he (Fischer) offered Polnitz coffee, soda, and a bologna sandwich, but Polnitz declined because he “didn’t eat b[o]lo[gna] sandwiches ... [or] drink soda.” According to Fischer, Polnitz initially denied that he was involved in the robbery. Fischer testified that Polnitz modified his story, however, after his alibi fell through and told Fischer that Deloache picked him up, showed him a gun, and asked him to participate in a robbery.

¶7 Detective Carl Buschmann conducted the second interview. Detective Buschmann testified that the second interview started at 4:30 p.m. on March 3, 2000, and ended at 6:20 p.m. Detective Buschmann advised Polnitz of his *Miranda* rights, and Polnitz again indicated that he understood and waived his rights. Buschmann testified that he did not make any threats or promises to Polnitz during the interview and that he asked Polnitz if he wanted something to eat or drink. Polnitz requested iced tea and peanut butter crackers, which Buschmann provided. Polnitz again denied that he was involved in the robbery. He claimed that Deloache picked him up and asked him to participate in a robbery, but that he refused, so Deloache dropped him off at a girlfriend’s house. Buschmann testified that Polnitz then asked if he could take a “lie detector test” because he wanted to prove that he was telling the truth.

¶8 Detective Ruben Burgos conducted the polygraph examination of Polnitz on March 4, 2000. The examination began at 9:49 a.m. and ended at 11:52 a.m. Detective Burgos testified that, before the examination began, he read Polnitz his *Miranda* rights and that Polnitz waived his rights. When the examination was finished, Burgos had Polnitz sign a form indicating that the

examination was complete, removed the polygraph attachments from Polnitz, and took Polnitz to an interview room “down the hall” where he left Polnitz alone.

¶9 Burgos testified that he returned approximately twenty-five minutes later and told Polnitz: “My investigation here is you’re not telling me the truth.” Detective Burgos then interviewed Polnitz a third time. The interview started at 12:17 p.m. and ended at 1:01 p.m. Burgos testified that, during the interview, he did not discuss the results of the polygraph examination with Polnitz, and he did not make any threats or promises to Polnitz. Polnitz admitted that he was in the car with Deloache at the time of the robbery and that he put on the mask that Deloache had given to him but that he “just stood there” while Deloache robbed one of the women. Polnitz claimed that he did not run away because Deloache “knew w[h]ere he lived.”

¶10 Polnitz also testified at the hearing. Polnitz acknowledged that he received his *Miranda* rights at the beginning of the first two interviews and the polygraph examination. Polnitz, however, gave a different version of the events in several respects. He testified that, during the first and the second interviews, the detectives told him that someone would get food from McDonald’s for him, but that no one ever did. Polnitz also claimed that he did not sleep because he spent the night in a bullpen where he had to sleep on a concrete floor. He further claimed that all three of the detectives told him that if he took a polygraph examination, he could go home. Finally, Polnitz testified that, during the third interview, Detective Burgos discussed the results of the polygraph examination with him and told Polnitz that if he admitted to being involved in the robbery, he [Burgos] would help him “get out of there.”

¶11 The trial court found that Polnitz’s first two statements were voluntary. It initially found that Polnitz’s third statement was involuntary, however, because of: (1) the twenty-six hour delay from the time Polnitz was arrested to the start of the third interview; and (2) the “absence of food and a proper place to sleep were coercive.” It subsequently reversed its ruling and found that Polnitz’s confession was voluntary because the detectives did not make any threats or promises to Polnitz and because the detectives did not deny Polnitz food or try to deprive him of sleep. It also found that the length of the detention did not render the confession an inadmissible “sew-up” confession because the delay was not created by the detectives. Finally, it determined that Polnitz’s confession was admissible because it was sufficiently distinct from the polygraph examination.

II. ANALYSIS

¶12 First, Polnitz claims that the trial court erred when it denied his motion to suppress his third statement because he “went basically without food or sleep for twenty-seven hours before he finally confessed.”⁴ Polnitz’s allegations involve overlapping claims. First, it appears that Polnitz is challenging the voluntariness of his confession.

¶13 “In determining whether a confession was voluntarily made, the essential inquiry is whether the confession was procured [through] coercive means or whether it was the product of improper pressures exercised by the police.” *State v. Clappes*, 136 Wis. 2d 222, 235–236, 401 N.W.2d 759, 765 (1987). We look to the totality of the circumstances to determine whether a confession is

⁴ Polnitz does not challenge the trial court’s ruling on the voluntariness of his first two statements.

voluntary, balancing the personal characteristics of the defendant against the coercive or improper police pressure. *State v. Pheil*, 152 Wis. 2d 523, 535, 449 N.W.2d 858, 863 (Ct. App. 1989). “However, we do not reach this balancing unless there is some improper or coercive conduct by the police.” *Id.*

¶14 Second, it also appears that Polnitz is claiming that his confession was a “sew-up” confession because twenty-seven hours was an unreasonable period of detention. An unreasonably long detention violates due process and renders a confession inadmissible, whether voluntary or involuntary. *Wagner v. State*, 89 Wis. 2d 70, 75, 277 N.W.2d 849, 851 (1979). Accordingly, the police may not detain the accused for an unreasonably long period of time to “sew-up” the case by obtaining or extracting a confession. *Briggs v. State*, 76 Wis. 2d 313, 325, 251 N.W.2d 12, 16 (1977). A post-arrest detention is permissible, however, as long as there is a reasonable purpose and the period of detention is not unjustifiably long. *See State v. Hunt*, 53 Wis. 2d 734, 742, 193 N.W.2d 858, 864 (1972).

¶15 We will uphold the trial court’s findings of evidentiary or historical facts unless those findings are against the great weight and clear preponderance of the evidence. *Clappes*, 136 Wis. 2d at 235, 401 N.W.2d at 765. We independently review the trial court’s conclusion by applying constitutional principles to facts found by the trial court. *Id.*

¶16 Polnitz’s claim fails for several reasons. First, the evidence presented at the *Miranda/Goodchild* hearing supports the trial court’s conclusion that Polnitz’s confession was voluntary because there was no improper or coercive police conduct. The trial court found that the detectives did not deprive Polnitz of food because, it found, during the first interview, Detective Fischer offered Polnitz

a “substantial food product”—a bologna sandwich. Polnitz refused because, in his own words, “I don’t eat b[o]lo[gna].”⁵ Thus, the trial court determined that Polnitz did not eat anything substantial because “he refused a sandwich that was offered to him,” not because the police denied him food.

¶17 The trial court also determined that the detectives did not engage in misconduct merely because Polnitz had to sleep on a concrete floor. It found that the detectives did not harass or coerce Polnitz while he was sleeping.

¶18 The only evidence that Polnitz presents contrary to the trial court’s findings are his self-serving statements that the detectives promised he could go home if he took a polygraph examination and that, during the third interview, Detective Burgos told him that he [Burgos] would help him if he admitted that he was involved in the robbery. The determination of witness credibility, however, is left to the trial court, *Dejmal v. Merta*, 95 Wis. 2d 141, 151–152, 289 N.W.2d 813, 818 (1980), and we will not overturn a trial court’s findings of fact unless they are “clearly erroneous.” See WIS. STAT. RULE 805.17(2) (made applicable to criminal proceedings by WIS. STAT. § 972.11(1)). Here, the trial court found the detectives’ testimony that they did not make any promises or threats more credible: “I did not find the defendant’s testimony credible ... [t]here’s nothing that the police said or did to the defendant that was coercive or mean or threatening or hostile.” Polnitz has not shown how this finding is clearly erroneous. Accordingly, the facts support the trial court’s conclusion that there was no police misconduct. See *Bradley v. State*, 36 Wis. 2d 345, 358,

⁵ In his brief, Polnitz claims that he “advised the officers that he *couldn’t* eat bologna, not that he simply didn’t have a taste for it.” (Emphasis added.) This was not Polnitz’s testimony at the hearing, however. There, he claimed that he told the detective that he “*didn’t* eat b[o]lo[gna].” (Emphasis added.)

153 N.W.2d 38, 43 (1967) (confession was not involuntary due to defendant's hunger and physical fatigue where the police offered the defendant food and a chance to rest); *Hunt*, 53 Wis. 2d at 741, 193 N.W.2d at 863 (no police coercion where the defendant was "not disturbed by anyone during the nighttime sleeping hours").

¶19 Polnitz also claims that his confession was involuntary because: (1) he requested food and did not receive any; and (2) a detective denied his request to make a telephone call. The trial court expressly rejected these contentions. Polnitz has not shown how these findings are clearly erroneous. Without any evidence of police coercion, our involuntariness analysis ends.

¶20 Polnitz's claim that the police detained him for an unreasonable amount of time to obtain a "sew-up" confession is also without merit. The trial court determined that the length of Polnitz's detention was reasonable for two reasons. First, it found that part of the delay was caused by the detectives' investigation of Polnitz's alibi. During the first interview, Polnitz told Detective Fischer that he was with family members during the time of the robbery. When Fischer contacted Polnitz's alibi witnesses, they denied having any contact with Polnitz during the time of the robbery. Thus, the trial court determined that "a reasonable police officer[]" would "want to ask [Polnitz] further questions -- hence the second statement."

¶21 The trial court also found that the remaining delay was caused by Polnitz's request to take a "lie detector test." The trial court found credible Detective Buschmann's testimony that Polnitz requested a polygraph examination during the second interview. See *Dejmal*, 95 Wis. 2d at 151–152, 289 N.W.2d at 818. Thus, it determined that "[f]rom that point on the delay is not being created

by the police. The delay is to benefit the defendant, to give him the opportunity to take the lie detector test.” The court further “assum[ed]” that a polygraph operator was not available when the second interview concluded at 6:20 p.m. and found: “The delay, then, overnight inferentially, from the record, is for arranging the polygraph that the defendant himself has requested.” The trial court thus concluded that Polnitz’s confession was not a “sew-up” confession because the detectives were not “contriving t[o] delay.”

¶22 The law supports the trial court’s conclusion. The police may reasonably extend an accused’s detention to investigate an alibi or to give him an opportunity to take a polygraph examination. See *Hunt*, 53 Wis. 2d at 742–743, 193 N.W.2d at 864–865 (delay reasonable where officers verified defendant’s story); *State v. Wallace*, 59 Wis. 2d 66, 79, 207 N.W.2d 855, 862 (1973) (delay reasonable where defendant “volunteered to take a lie detector test”). Accordingly, Polnitz’s confession was not an impermissible “sew-up” confession.

¶23 Third, Polnitz alleges that his confession was inadmissible because it was obtained “as part of the polygraph examination.” We disagree.

¶24 In Wisconsin, polygraph test results are inadmissible in criminal proceedings. *State v. Dean*, 103 Wis. 2d 228, 279, 307 N.W.2d 628, 653 (1981). Statements made during post-polygraph interviews may be admissible if the post-polygraph interview is distinct from the mechanical polygraph test “both as to time and content.” *State v. Schlise*, 86 Wis. 2d 26, 43–44, 271 N.W.2d 619, 627 (1978). Conversely, post-polygraph statements are inadmissible if the post-polygraph interview “is so closely related to the mechanical portion of the polygraph examination that it is considered one event.” *State v. Johnson*, 193 Wis. 2d 382, 388, 535 N.W.2d 441, 443 (Ct. App. 1995). This determination is

made after a consideration of the totality of the facts and circumstances in the individual case. *Barrera v. State*, 99 Wis. 2d 269, 288, 298 N.W.2d 820, 828–829 (1980).⁶

¶25 We will uphold the trial court’s findings of historical and evidentiary fact unless they are clearly erroneous. *Johnson*, 193 Wis. 2d at 387, 535 N.W.2d at 442. The application of the facts to the constitutional principles, however, is a question of law that we review independently. *Id.*

¶26 Here, the polygraph examination and the third interview were sufficiently discrete as to time and content for several reasons. First, after the polygraph examination was complete, Polnitz signed a release form that provided: “This examination was concluded at 11:52 on the above date.... I also understand that any questions I may be asked after this point in time, and any answers that I may give to those questions, are not part of the polygraph examination.” Thus, Polnitz was aware that the polygraph examination was over and that his statements from that point forward were not part of the polygraph examination.⁷ *See*

⁶ Courts have considered numerous factors, including: (1) whether the statements were made after the mechanical polygraph portion of the examination was complete; (2) whether the defendant was attached to the polygraph machine at the time the inculpatory statements were made; (3) whether the post-polygraph examination took place in a separate room; (4) whether the questioner referred to the polygraph charts or told the defendant he had failed in order to elicit inculpatory statements, *see State v. Johnson*, 193 Wis. 2d 382, 389, 535 N.W.2d 441, 443 (Ct. App. 1995); (5) whether the defendant was informed that the test was over, *see State v. Schlise*, 86 Wis. 2d 26, 42, 271 N.W.2d 619, 627 (1978); and (6) the amount of time between the polygraph examination and the post-polygraph interview, *see Barrera v. State*, 99 Wis. 2d 269, 288, 298 N.W.2d 820, 829 (1980).

⁷ At the hearing, Polnitz claimed that he could not read. The trial court rejected this claim: “I did not find the defendant’s testimony credible that he can’t read or write. The physical evidence contradicts that.”

McAdoo v. State, 65 Wis. 2d 596, 608, 223 N.W.2d 521, 528 (1974) (sufficient attenuation where the defendant was informed that the test was over).

¶27 Second, the trial court found that Detective Burgos interviewed Polnitz in a different room and conducted the post-polygraph interview twenty-five to thirty-five minutes after the polygraph examination was completed. Polnitz does not challenge these findings. Thus, the post-polygraph interview was distinct in both time and location from the polygraph examination. See *Johnson*, 193 Wis. 2d at 389, 535 N.W.2d at 443 (polygraph examination and subsequent interview were “sufficiently separate” where defendant was not attached to the polygraph machine and the interview took place in a different room).

¶28 Third, the trial court found that Detective Burgos did not refer to the polygraph questions or results to “induce or coerce a statement” from Polnitz. The trial court also rejected Polnitz’s claim that Detective Burgos discussed the results of the polygraph examination with him. Polnitz argues, however, that Detective Burgos “inferred” that the results of the polygraph examination indicated that Polnitz was lying when he told Polnitz that “[m]y investigation here is you’re not telling me the truth.” We disagree. Burgos’s statement did not reference the polygraph examination in any way—Burgos did not refer to polygraph charts or tell Polnitz that he failed the polygraph test. See *id.* (polygraph examination and interview were distinct where the examining officer “did not refer to polygraph charts or tell [the defendant] he had failed the polygraph test”). Accordingly, the facts support the trial court’s conclusion that, under the totality of the circumstances, Polnitz’s post-polygraph confession was admissible because it was sufficiently attenuated from the polygraph examination.

¶29 Finally, Polnitz argues that, even if the third interview was sufficiently distinct from the polygraph examination, his confession was inadmissible because Detective Burgos failed to give him *Miranda* warnings after the polygraph examination was complete. We disagree.

¶30 “There is no requirement that *Miranda* warnings be repeated once they are given.” *State v. Cydzik*, 60 Wis. 2d 683, 691, 211 N.W.2d 421, 427 (1973). Here, the trial court found that Detective Burgos “very clear[ly] and ... wonderful[ly]” explained Polnitz’s *Miranda* rights to him at the beginning of the polygraph interview. This occurred at 9:49 a.m., approximately two hours and twenty-eight minutes before the third interview. Under these circumstances, the detective was not required to read another set of *Miranda* rights. *See Maguire v. United States*, 396 F.2d 327, 331 (9th Cir. 1968) (*Miranda* warning three days before interrogation sufficient); *Miller v. United States*, 396 F.2d 492, 496 (8th Cir. 1968) (*Miranda* warning at 11:10 a.m. sufficient when statement was signed between 2:30 p.m. and 2:45 p.m.). Accordingly, Polnitz’s confession was admissible and the trial court correctly denied his motion to suppress.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

